

Positive State Obligations Regarding Fundamental Rights and 'Changing the Hearts and Minds'

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Human rights are also called 'fundamental rights', which emphasises the fundamental importance of these rights and their effective enjoyment. They should secure for human beings a dignified life, making human dignity an important underlying principle of human rights.¹ The need for these rights to be effectively enjoyed, and thus for the effective protection of fundamental rights² has resulted in the identification of an increasing detail and amount of positive state obligations,³ also in relation to civil and political rights, that initially were primarily conceived as 'defensive rights', implying a protection against arbitrary interferences by public authorities.⁴

Notwithstanding the common acceptance that states indeed have a range of positive obligations in relation to fundamental rights, many difficult questions remain as to the exact boundaries of these positive obligations. What can reasonably be expected from public authorities, also in terms of time span in which particular results should be reached? How do these positive state obligations relate to the negative state obligations of non-interference? In this respect, it is surely instructive to analyse and evaluate what relevant parameters international human rights courts have identified so far?

These boundary questions and possible tensions with negative state obligations are particularly an issue concerning these fundamental rights that would require the eradication of ingrained prejudice and stereotypical thinking. The fundamental right most centrally

involved is the prohibition of discrimination, triggering discussions about how far state obligations go to ensure an effective protection against discrimination in private relationships. Particular attention is needed for the prohibition of discrimination on so-called suspect grounds, referring to grounds of differentiation that are not only irrelevant for one's functioning in society but also have gone hand in hand with systemic discrimination.⁵ Grounds that have a long pedigree as 'suspect ground' include gender and race. Importantly, the identification of suspect grounds is not static, but dynamic, in that over time additional grounds are being added to the list of suspect grounds. To some extent, this is reflected in the development of conventions focusing on discrimination on particular (suspect) grounds, such as the United Nations Convention on the Elimination of All forms of Discrimination against Women (CEDAW, regarding gender), United Nations Convention on the Elimination of all forms of Racial Discrimination (CERD, regarding race) and United Nations Convention on the Rights of Persons with Disabilities (UN CRPD, disability). Nevertheless, there are also grounds that are (generally) considered as suspect, but that so far have not generated a distinct convention, such as sexual orientation and religion.⁶

In addition to the prohibition of discrimination, fundamental rights that imply state obligations to respect and protect one's distinct identity are relevant here as these also point to state obligations to counter stereotypes and prejudice in relation to these distinct identities. Minority-specific rights, and their intrinsic concern with the right to respect for a distinct ethnic, religious and or linguistic identity, on the one hand, and substantive, real equality, on the other, are indeed intertwined with the fight against prejudice and stereotypes. Relatedly, the interpretation of some general fundamental rights also point to state duties to respect distinct identity of particular groups, such as the freedom to manifest one's

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1. J. Waldron, *Dignity, Rank and Rights*, Oxford, OUP (2012). See also C. McCrudden, 'Dignity and Judicial Interpretation of Human Rights', 19 *European Journal of International Law*, 655 (2008).

2. The ECtHR has developed a steady line of jurisprudence to this effect; see e.g. *Airey v. Ireland*, ECHR (1979) Series A, No. 6389/73, at para. 24; *Artico v. Italy*, ECHR (1980) Series A, No. 6694, 74, at para. 33; *Mehmet Eren v. Turkey*, ECHR (2008) Series A, No. 32347, 2. See also A. Reinisch, 'The Changing International Legal Framework', in P. Alston (ed.), *Non-State Actors and Human Rights*, Oxford, OUP (2005), at 79-80.

3. See also V. Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights', 18 *Human Rights Law Review* 309-346 (2018).

4. Inter alia T. Van Boven, 'Distinguishing Criteria of Human Rights', in K. Vasak and P. Alston (eds.), *The International Dimensions of Human Rights*, Westport, Greenwood Press (1982), at 87.

5. See also J. Gerards, 'Intensity of Judicial Review in Equal Treatment Cases', 51 *Netherlands International Law Review* (2004), 162 *et seq.*

6. For an argument about the ambiguous protection of religious minorities due to (inter alia) the fact that no convention is adopted which focuses on religion as prohibited ground of discrimination, see K. Henrard, *The Ambiguous Relationship between Religious Minorities and Fundamental (Minority) Rights*, The Hague, Eleven (2011), at 43-44.

religion,⁷ and the right of respect for privacy, family life and home.⁸

When having regard to positive state obligations to (aim to) eradicate ingrained prejudice and stereotypical thinking, the ultimate question seems to be whether and, if so, to what extent, states are obliged (to try) to change people's hearts and minds. This undoubtedly controversial question was the subject of an international conference, organised at the Erasmus University Rotterdam in January 2020, with the generous financial support of the Erasmus Trust Fund, the EUR Initiative of Inclusive Prosperity and ESL's Rule of Law research programme.

In order to address this complex question in an appropriate manner, three avenues were identified, resulting in three strands of presentations. The first strand set out to develop the parameters for such positive state obligations from a multi-disciplinary perspective, more particularly combining the parameters visible in the human rights paradigm, as well as in sociology and ethics. When assessing and evaluating the extent to which states could be obliged to try to change hearts and minds, the preliminary non-legal questions about sociological possibilities (can states at all change the way people think and feel?) and possible ethical constraints need to be taken into account as well. The second strand of presentations zoomed in on the time factor involved, in the sense that countering deep-seated prejudice and discrimination is a process that takes considerable time, has a 'long durée', and is often not linear. The third strand of presentations charted the trends that emerge in the (quasi) jurisprudence of a range of international human rights courts, when zooming in on particular vulnerable groups, often targets of prejudice and discrimination, more particularly Roma, Muslim minorities in the Western world, LGBTI and persons with a disability. Each presentation focused on one particular vulnerable group, whilst having regard to various relevant conventions and related supervisory practice, so as to be able to paint an overall picture.

This special issue of Erasmus Law Review captures the presentations and subsequent discussions at the international conference, and thus reflects the three strands.

The first strand of three articles paints a multi-disciplinary picture, by highlighting, respectively, the relevant parameters of the human rights paradigm (Stephanie Berry), sociological considerations (Anita Böcker) and ethical perspectives (Ioanna Tourkochoriti) about state duties to change the hearts and minds of people in relation to prejudice. In the first article, Berry reframes the question as one about 'A Positive State Obligation to Counter Dehumanisation under International Human Rights Law'. She claims that every society has in-

groups and out-groups, with out-groups being particularly vulnerable to rights violations by the in-group. These rights violations are facilitated by the dehumanisation of the out-group by the in-group. Consequently, she argues that the creation of international human rights law (IHRL) treaties and corresponding monitoring mechanisms should be viewed as the first step towards protecting out-groups from human rights violations. In this respect, it is essential that IHRL monitoring mechanisms recognise the connection between dehumanisation and rights violations and develop a positive state obligation to counter dehumanisation. Berry welcomes in this regard that the four treaties reviewed in her article, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the Framework Convention for the Protection of National Minorities and the International Convention on the Elimination of All Forms of Racial Discrimination, all establish positive state obligations to prevent hate speech and to foster tolerant societies. Whilst these obligations should, in theory, allow IHRL monitoring mechanisms to address dehumanisation, Berry claims that as it stands the jurisprudence of these mechanisms remains too vague and general, and does not sufficiently counter unconscious dehumanisation.

Böcker in her article on 'Can Non-discrimination Law Change Hearts and Minds' explores a question which has preoccupied sociolegal scholars for ages, namely whether law, and more particularly non-discrimination law, can change 'hearts and minds'. The first part of her article examines how sociolegal scholars have theorised about the possibility and desirability of using law as an instrument of social change. The second part discusses the findings of empirical research on the social working of various types of non-discrimination law. Böcker reviews the extent to which non-discrimination law is able to create social change, and the factors that influence this ability. A recurring question is whether this change concerns only persons' outward behaviour or also their hearts and minds. In the end, she concludes that the research literature does not provide unequivocal answers. Nevertheless, the overall picture emerging from the sociolegal literature is that law is generally more likely to bring about changes in external behaviour, whilst attitudes and beliefs are only indirectly influenced, more particularly by altering the situations in which attitudes and opinions are formed.

Ioanna Tourkochoriti turns in her article to the related ethical question 'How far should the state go to counter prejudice?' She discusses the material and immaterial harm that discriminatory behaviour causes. Discrimination reinforces a broader context of social power; causes harm to the social standing of the person, psychological harm, economic and physical harm and even existential harm. All these harms threaten peaceful social coexistence. For liberals, a state can only intervene with the actions of a person when there is a risk of harm to others or a threat to social coexistence. The article distinguishes between appropriate and non-appropriate uses of government power. Appropriate uses are those

7. The ECtHR has a steady line of jurisprudence in which it underscores that states should work towards religious harmony and tolerance, and thus make religions respect one another: see inter alia ECtHR, *Metropolitan Church of Bessarabia v. Moldova*, 16 December 2008.

8. See in this respect the famous reasoning of the ECtHR in the *Chapman v. UK*, 18 January 2001, at para. 96.

which address the reasonable and emotional faculties of humanity and which encourage sympathetic understanding. Research in the areas of behavioural psychology, neuroscience and social psychology indicates that it is possible to bring a change in hearts and minds. Encouraging a person to adopt the perspective of the person who has experienced discrimination can lead to sympathetic understanding. Tourkochorití consequently claims that it is legitimate for the state to practice soft paternalism towards changing hearts and minds in order to prevent behaviour which is discriminatory.

The focus of the conference's second strand on the time factor involved is represented by the article of Anton Kok *et al.* (Anton Kok, Lwando Xaso, Annelize Steenkamp and Michelle Oelofse) on post-apartheid South Africa. Their article confirms not only the critical importance of education for strategies of public authorities to change the hearts and minds in relation to prejudice and stereotypes but also that this concerns a process that does not happen overnight but rather takes time, often several generations. They discuss the struggles in South Africa to obtain an equal society, with equal opportunities for all irrespective of racial or ethnic origin, by zooming in on the way in which the promotion of equality agenda is realised in the educational setting: 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform to Promote Equality through Schools and the Education System'.

The article starts by highlighting the ways in which the education system can be used to promote equality in the context of changing people's hearts and minds – values, morals and mindsets. The duties contained in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') bind private and public schools, educators, learners, governing bodies and the state. Unfortunately, the part of the Act that concerns the duty of all actors to promote substantive equality has not been translated into measurable goals, and thus remains a dead letter. The authors make concrete suggestions as to how an enforceable duty to promote equality in schools could be fashioned, and what amendments would need to be made to the Equality Act to realise this. The authors also reflect on how the duty to promote equality should then play out practically in the classroom to facilitate a change in learners' hearts and minds.

The conference's third strand resulted in four articles, each of which zooms in on one particularly vulnerable group, victims of systemic discrimination, and the jurisprudence that can be distilled from several international human rights supervisory mechanisms concerning positive state obligations to counter this discrimination and the related prejudice (in people's hearts and minds). The supervisory practice concerned does not explicitly contain references to 'changing hearts and minds', but several of the positive obligations identified by these supervisory mechanisms can be seen in this frame.

Lilla Farkas in her article on Roma 'Positive Obligations' Potential to Turn the Tide on Romaphobic Attitudes and Support the Development of "Roma pride" analyses the case law and recommendations of international supervisory mechanisms concerning the education and housing of Roma and travellers to assess whether positive state obligations can be identified to change the hearts and minds of the majority and promote minority identities. She highlights a marked difference in this respect between the jurisprudence on education on the one hand and the supervisory practice on housing on the other. The supervisory practice concerning education deals with integration rather than with cultural specificities, whilst in the context of housing, it accommodates minority (Roma-specific) needs. In the latter context, positive obligations are pitched at a higher level in the sense that majorities are required to tolerate the minority way of life in overwhelmingly segregated settings. Conversely, in the educational setting, further legal and institutional reform, as well as a shift in both majority and minority attitudes, would be necessary to dismantle social distance and generate mutual trust. Farkas argues that the interlocking factors of accessibility, judicial activism, European politics, expectations of political allegiance and community resources explain jurisprudential developments. The weak justiciability of minority rights, the lack of resources internal to the community and dual identities among the Eastern Roma impede legal claims for culture-specific accommodation in education. Conversely, the protection of minority identity and community ties has gained importance in the housing context, subsumed under the right to private and family life.

Kristin Henrard zooms in on Islamophobia in the Western world. Islamophobia, like xenophobia, points to deep-seated, ingrained discrimination against a particular group, whose effective enjoyment of fundamental rights is impaired. She evaluates the way in which and the extent to which positive state obligations to counter Islamophobia become visible in the supervisory practice of the Human Rights Committee (International Covenant on Civil and Political Rights), the European Court of Human Rights and the Advisory Committee of the Framework Convention for the Protection of National Minorities. The supervisory practice is analysed in two steps: The analysis of each international supervisory mechanism's practice is, in itself, followed by the comparison of the fault lines in these respective supervisory practices. The latter comparison is structured around the two main strategies that states can adopt in order to counter intolerance: On the one hand, the active promotion of tolerance, inter alia through education, awareness-raising campaigns and the stimulation of intercultural dialogue; and on the other, countering acts informed by intolerance, in terms of the prohibition of discrimination (and/or the effective enjoyment of substantive fundamental rights). Overall, a rather mixed record emerges, as well as considerable scope for clarification of positive state obligations to counter Islamophobia. In terms of the active promotion of tolerance,

minority-specific rights provisions are more developed, in comparison with the general fundamental rights (also those concerning education). In this respect, various possibilities to engage in systematic interpretation are identified. The supervisory practice regarding counter-acting acts of intolerance and discrimination reveals that when international supervisory mechanisms do not have a strong base line protection against interferences with fundamental rights, it is essential that an Islamophobic context is factored in explicitly in the human rights analysis. Such a context should then trigger heightened scrutiny for the freedom of religion as well as an explicit non-discrimination analysis.

Alina Tryfonidou explores the range of positive state obligations that can be identified in order to provide sexual minorities with substantive equal access to and enjoyment of a range of fundamental rights: 'Positive state obligations under European law: A tool for achieving substantive equality for sexual minorities in Europe'. She underscores that the law should respect and protect all sexualities and diverse intimate relationships without discrimination. For this purpose, the law needs to ensure that not only can sexual minorities be free from state interference when expressing their sexuality in private but that they should also be given the right to express their sexuality in public and to have their intimate relationships legally recognised. In addition, sexual minorities should be protected from the actions of other individuals, when these violate their legal and fundamental human rights. Tryfonidou joins the preceding two authors in their assessment that there is substantial scope for improvement regarding the identification of positive state obligations that can contribute to changing the hearts and minds of people. According to Tryfonidou, European law should not wait for hearts and minds to change before imposing additional positive obligations, especially since this gives the impression that the European Union (EU) and the European Court of Human Rights (ECtHR) are condoning or disregarding persistent discrimination against sexual minorities.

Finally, Andrea Broderick delves into positive obligations to counter stereotypes and ensure inclusive equality for people with disabilities: 'Ensuring Slow but Steady Transformations in Hearts and Minds concerning People with Disabilities: Viewing the UN Treaty Bodies and the Strasbourg Court through the Lens of Inclusive Equality'. She underscores that the entry into force of the CRPD pushed state obligations to counter prejudice and stereotypes concerning people with disabilities to the forefront of international human rights law. The CRPD is underpinned by a model of inclusive equality, which views disability as a social construct that results from the interaction between persons with impairments and barriers, including attitudinal barriers, that hinder their participation in society. The recognition dimension of inclusive equality, together with the CRPD's provisions on awareness raising, mandates that state parties target prejudice and stereotypes about the capabilities and contributions of persons with disabili-

ties to society. She shows that certain human rights treaty bodies, including the Committee on the Rights of Persons with Disabilities and, to a much lesser extent, the Committee on the Elimination of Discrimination against Women, require states to eradicate harmful stereotypes and prejudice about people with disabilities in various forms of 'interpersonal' relationships. The CRPD Committee goes beyond legal measures and focuses strongly on awareness-raising and training measures aimed at removing attitudinal barriers that are at the core of the marginalisation of people with disabilities. A further differentiation is made in relation to the ECtHR, in the sense that notwithstanding its recognition that the CRPD embraces a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment, the Court has – unfortunately – wavered in its approach to positive state duties to tackle stereotypes and prejudice.

Concluding Observations

Throughout the conference, and the resulting articles, a recurring point was made about the fact that law can never be enough when aiming to change peoples' hearts and minds. Law can set out to steer behaviour, but can it really change the former? There is no straightforward answer to this sociological question. It could be argued that when the law is successful in steering behaviour, it will over time also become successful in changing hearts and minds. Nevertheless, in certain respects, the ideas and minds may change sooner than the actual behaviour. Also in this regard, change requires time.

The ethical constraints identified by Tourkochorití could also explain why international supervisory mechanisms so far have not developed a strong and coherent supervisory practice pertaining to positive state obligations to counter prejudice and stereotypes, and ultimately to change the hearts and minds. The four articles evaluating the international supervisory practice have revealed a mixed record. To be sure, supervisory bodies identify positive state obligations, several of which can be related to changing the hearts and minds, but there are significant divergencies. Overall, considerable work can and still needs to be done in order to arrive at a coherent body of supervisory practice that can be translated into concrete action at the domestic level.⁹ The importance of education, and more particularly education of different groups together, and of awareness-raising campaigns is highlighted throughout the special issue, as well as the often decisive role of civil society in the latter respect. Full and equal inclusion and participation of all 'vulnerable' groups in society is at the same time a goal and a means in regard to 'changing the hearts and minds' so as to eradicate prejudice and stereotypes.

9. See also E. Brems and A. Timmer, 'Introduction', in E. Brems and A. Timmer (eds.), *Stereotypes and Human Rights Law*, Antwerp, Intersentia (2016), at 4.